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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8 Humberto Monge-Rodriguez,)

9 Petitioner,)

10 v.)

11 United States of America,)

12 Respondent.)

CR 05-569-TUC-DCB
CV 05-620-TUC-DCB

13 **ORDER**

14
15 Pending before this Court is Petitioner Humberto Monge-Rodriguez's
16 ("Petitioner") "Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal
17 Custody, 28 U.S.C. § 2255" ("Motion"). For the reasons set forth below, Petitioner's
18 Motion is denied.

19 **I. BACKGROUND**

20 On March 23, 2005, Petitioner was indicted on one count of Illegal Re-Entry
21 After Deportation, in violation of 8 U.S.C. § 1326, as enhanced by § 1326(b)(2), a Class
22 C Felony offense. Petitioner pled guilty to the indictment on October May 2, 2005,
23 pursuant to a plea agreement with the Government.

24 In his plea agreement, Petitioner expressly waived his right to appeal and his
25 right to collaterally attack his conviction and sentence. (document 17) Petitioner
26 acknowledged that if he appealed or collaterally attacked his conviction or sentence, he
27 could be found in breach of the plea agreement and the government could withdraw from
28 the agreement. (*Id.*)

1 On July 12, 2005, Petitioner came before this Court for sentencing. At
2 sentencing, pursuant to the recommendations contained in the Presentence Report, as well
3 as sentencing range contained in the plea agreement, this Court sentenced Petitioner to 41
4 months imprisonment. (document 24)

5 Petitioner filed the present Motion on October 14, 2005.

6 **II. PROCEDURE**

7 Pursuant to 28 U.S.C. § 2255, a collateral attack on a sentence should be
8 presented to the court which imposed the allegedly improper sentence. 28 U.S.C. § 2255.
9 According to Rule 4(a) of the Rules Governing Section 2255 Proceedings, the motion
10 *shall* be directed to the judge who sentenced the petitioner. Rule 4(a), Rules Governing
11 Section 2255 Proceedings. Therefore, as the Court which imposed Petitioner's sentence, it
12 is appropriate for this Court to consider Petitioner's Motion.

13 Ordinarily, a court must conduct a hearing on a petition unless it "and the files
14 and records of the case conclusively show that the petitioner is entitled to no relief" 28
15 U.S.C. § 2255. The Motion in this matter, as well as the files and records, do
16 conclusively establish that Petitioner is not entitled to relief. *See Shah v. United States*,
17 878 F.2d 1156, 1159 (9th Cir. 1989). Hence, no hearing is required to rule on the present
18 Petition. For the same reasons, this Court does not require a response to the Petition from
19 the United States Attorney. 28 U.S.C. § 2255.

20 **III. DISCUSSION**

21 **A. Waiver of Right to Collateral Review**

22 Petitioner pled guilty. As part of his plea agreement, Petitioner waived any and
23 all motions, defenses, probable cause determination, and objections to the indictment or
24 the Court's entry of judgment or imposition of sentence. (document 17) Petitioner further
25 waived any right to appeal the Court's entry of judgment against his; any right to appeal
26 the imposition of sentence upon his; and any right to collaterally attack his conviction and
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1 sentence under 28 U.S.C. § 2255, or any other collateral attack. (*Id.*) As part of his plea
2 agreement, Petitioner acknowledged that the waiver of his rights would result in the
3 dismissal of any appeal or collateral attack he might file challenging his conviction or
4 sentence. (*Id.*) Petitioner indicated in his pleas that he had discussed the terms with his
5 attorney, that he agreed to the terms and conditions, and that he entered into it
6 voluntarily. (*Id.*)

7 On January 13, 2005, the Court held a hearing and specifically questioned
8 Petitioner whether he understood that he was waiving his right to appeal to a higher court
9 or to collaterally attack the conviction or the sentence as long as the sentence was
10 consistent with the plea agreement. Petitioner replied, under oath, that he understood.
11 Petitioner also indicated that he had an opportunity to discuss the agreement with his
12 attorney, that he had no questions about it, and that he entered into it voluntarily. The
13 Court accepted the plea as made knowingly, intelligently and voluntarily. (document 24)

14 Plea agreements are contractual in nature and their plain language will generally
15 be enforced if the agreement is clear and unambiguous on its face. *United States v.*
16 *Jeronimo*, 398 F.3d 1149, 1153 (9th Cir. 2005). For example, a waiver of appellate rights
17 is enforceable if the language of the waiver encompasses the right to appeal on the
18 grounds raised and the waiver is knowingly and voluntarily made. *Id.*

19 A defendant may waive the statutory right to bring a § 2255 action challenging
20 the length of his sentence. *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994);
21 *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1992), *cert. denied sub nom.*
22 *Abarca-Espinoza v. United States*, 508 U.S. 979 (1993). The only claims that cannot be
23 waived are a claim that the waiver itself was involuntary or that ineffective assistance of
24 counsel rendered the waiver involuntary. *See Pruitt*, 32 F.3d at 433 (expressing “doubt”
25 that a plea agreement could waive a claim that counsel erroneously induced a defendant
26 to plead guilty or accept a particular part of the plea bargain), *Abarca*, 985 F.2d at 1014

(expressly declining to hold that a waiver forecloses a claim of ineffective assistance or involuntariness of the waiver); *see also Jeronimo*, 398 F.3d at 1156 n.4 (summarizing *Pruitt* and *Abarca*, but declining to decide whether waiver of all statutory rights included claims implicating the voluntariness of the waiver).

Petitioner's claim does not fit this exception. Petitioner expressly waived issues regarding the imposition of sentence and expressly waived a § 2255 action. The Court accepted his plea as voluntarily made. *Compare United States v. Nunez*, 223 F.3d 956, 959 (9th Cir. 2000) (waiving appeal of sentencing issues also waives the right to argue on appeal that counsel was ineffective at sentencing), *cert. denied*, 534 U.S. 921 (2001). Consequently, the Court finds that Petitioner waived the issues raised in his § 2255 motion. Because the issues cannot survive even if Petitioner were permitted to amend his grounds, the Court will summarily dismiss the action as plainly without merit.

IV. CONCLUSION

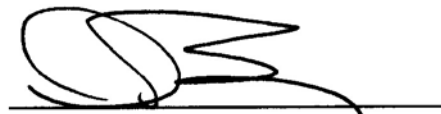
Upon review of the record in this case, the Court finds that Petitioner's Motion is subject to summary dismissal because the claims fall within the scope of the appeal rights Petitioner waived in his plea agreement, which was made knowingly and voluntarily.

Accordingly,

IT IS ORDERED that Petitioner Humberto Monge-Rodriguez's ("Petitioner") "Motion to Correct and Vacate Sentence" (CR 05-569, document 25) is **DENIED**.

IT IS FURTHER ORDERED that Civil case number CV 05-620 TUC-DCB is **DISMISSED** with prejudice and the Clerk of Court shall enter judgment accordingly.

DATED this 25th day of October, 2005.


David C. Bury
United States District Judge